MALAYSIAN REPORTS

MOOKAPILLAI & ANOR. v. LIQUIDATOR, SRI SARINGGIT SDN. BHD. & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 24 & April 8, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 214 of 1979]

Company Law — Application by minority shareholders — Order for company to be wound up — Liquidator appointed — Sale of rubber estate belonging to company — Application by appellants for stay of liquidation — Agreement between shareholders that company would purchase shares of minority shareholders and that paid up capital of company be reduced — Sum required to be raised by mortgage of properties — Application refused by trial judge — Companies Act, 1965, ss. 64, 67, 181 & 243.

In this case the minority shareholders originally applied for the purchase of their shares by the company or for the company to be wound up. An order was made for the company to be wound up and a liquidator appointed. The liquidator took steps to sell the rubber estate belonging to the company. Subsequently the appellants applied for a stay of the execution and for other relief. An agreement was arrived at between the majority and the minority shareholders the effect of which was to provide that the company would purchase the shares of the minority shareholders for $1,260,910 and for a reduction of the paid up capital of the company and that the company would raise the stipulated sum by a mortgage of its assets. The learned trial judge dismissed the application and directed the liquidator to proceed with the sale. The appellants appealed.

Held: (1) section 67 of the Companies Act, 1965 clearly prohibits except as is otherwise expressly provided by the Act the purchase by a company of its own shares or any direct or indirect financial assistance by it for the purchase of its shares. In this case there was a prayer for an order for reduction of capital without going through the essential requirements laid down in section 64 of the Act for a special resolution and the other requisite preliminaries. The provisions of sections 64 and 67 of the Act therefore applied to preclude the order sought;

(2) in this case the liquidation had been going on for a considerable time and the sale by the liquidator of the estate was virtually completed and therefore the learned judge exercised his discretion under section 243 of the Act correctly in refusing the application for a stay and the other orders sought.

Cases referred to:-

(1) *In re Crown Bank* (1890) 44 Ch. D. 634.

(2) *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409.

(3) *Armour Hick Northern Ltd. & Ors.* v. *Whitehouse & Ors.* [1980] 3 All E.R. 833; 1 W.L.R. 1520.

(4) *In re Calgary and Edmonton Land Co. Ltd. (In Liquidation)* [1975] 1 W.L.R. 355, 358-359.

FEDERAL COURT.

R.R. Chelliah (*R.R. Sethu* with him) for the appellants.

P.P. Royan for the 1st respondent.

K. Ananthan for the 2nd, 3rd and 4th respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): Sri Saringgit Sendirian Berhad no longer reflects if it was ever intended to and has certainly far outgrown its humble and perhaps even cherished origins if that was indeed the case as suggested by the literal Malay connotation of its name as a revered one-dollar entity. The company's sole asset was a rubber estate known as Saringgit Estate which in the course of winding-up the liquidator of the company agreed to sell to a purchaser for $3,900,000 under an agreement made on July 28, 1979. Mr. Chelliah for the appellants tells us from the Bar that the value of the estate now is in fact some $6 million. The appeal before us is against the order of Mohamed Azmi J., refusing a stay of the winding-up proceedings in an application made by the appellants under section 243 of the Companies Act, 1965 ('the Act') and it is manifestly obvious that the *leitmotiv* of this application was to abort the sale of the estate by the liquidator presumably in view of the current value of the estate intimated to us, and this perhaps also explains the change of heart and stance on the part of the 2nd, 3rd and 4th respondents who had vehemently opposed previous applications for a stay of the sale but who now, in the words of Mr. Ananthan of counsel appearing for them, supported the appellants' application 'because things went to our satisfaction'.

We should perhaps also observe at the outset that Mr. Royan for the liquidator informs us that this appeal is in fact no more than an academic exercise as all but one of the seven titles to the land in question have been transferred to and registered in the name of the purchaser and the seventh presented but not as yet registered. He submits that with regard to the six titles registered in the name of the purchaser, in the event this appeal is allowed then the court would have to order the removal of the name of the purchaser as the registered proprietor and restore that of the company and that this cannot be done under any of the relevant provisions of section 340 of the National Land Code, 1965. This matter of the registration of the six titles in the name of the purchaser has taken Mr. Chelliah somewhat by surprise as he obviously was not aware of it but in his reply he submits the somewhat startling proposition that the court can set aside the transfers of the six titles under its inherent jurisdiction without telling us how this can be effected in the face of the express provisions of the National Land Code.

First things first, however, and adverting to a chronological narration of facts and events to put the picture and the position of the parties in proper perspective and in order to appreciate the matter under review, the 1st and 2nd appellants together with Madam Ponnammal who is the wife of the former and mother of the latter are the majority shareholders in the company and the 2nd, 3rd and 4th respondents are the minority shareholders. The latter applied by the substantive motion in these proceedings under section 181 of the Act in what have commonly come to be known as 'oppression' proceedings *inter alia* for the company to purchase their shares at a price to be fixed by an approved company auditor or alternatively for the company to be wound up. Although the 2nd, 3rd and 4th respondents had asked for the purchase of their shares by the company, Mr. Ananthan tells us that at the hearing of the motion they in fact urged an order for the company to be wound up and an order to that effect was in fact made on January 13, 1978. A notice of appeal was filed against that decision the next day and on January 31, 1978 the liquidator was appointed for the purposes of the winding-up.

On October 9, 1978 the appellants applied formally to the High Court for a stay but it would seem that the application was not sealed or issued as the court file in the matter appeared to be missing. On November 9, 1978 the appellants took out an originating summons to restrain the sale until the appeal was heard but this was dismissed on January 28, 1979. The appellants then applied to the Federal Court for a stay but this again was refused on June 25, 1979. On July 28, 1979 the liquidator for and on behalf of the company entered into an agreement for the sale of the estate to Western Gate Sendirian Berhad. On September 12, 1979 the liquidator obtained an order vesting the land comprising the estate in him by his official name in order to effectuate the sale to the purchaser.

The appellants applied by summons-in-chambers on September 12, 1979 under section 243 of the Act for a stay of the liquidation and certain other relief and it is this application which is the subject-matter of this appeal. The first prayer is for the discharge and stay of the winding-up order made on January 13, 1978. We would pause to immediately point out as we did to Mr. Chelliah that under section 243 there is only power to stay a winding-up either altogether or for a limited time but no question of a discharge can arise. The summons then seeks an order for the company to purchase all the shares of the minority shareholders for the total sum of $1,210,910 with certain consequential orders including the payment by the company to the minority shareholders of that sum as set out in prayers 2 to 6 therein, orders for the reduction of the company's capital from $440,000 to $314,000 and the release and discharge of the liquidator and contains other prayers which are not material for the purposes of this appeal. On September 28, 1979 the 1st appellant on behalf of the majority shareholders and the 2nd respondent on behalf of the minority shareholders entered into a written agreement, the net effect of which was to provide that the company would purchase the shares of the minority shareholders for $1,260,910 and for a reduction of the paid-up capital of the company and that the company would raise the stipulated sum by a mortgage of its assets. In the light of this agreement the 1st appellant requested in an affidavit that prayers 2 to 6 of the summons under section 243 of the Act be substituted by an order of court approving the scheme of arrangement contained in the agreement of September 28, 1979.

As we have indicated earlier the minority shareholders in the persons of the 2nd, 3rd and 4th respondents now changed the stand they previously took and supported the application made by the appellants and the only person who opposed the application was the liquidator on the ground that he had on September 20, 1979 received the full agreed purchase price for the estate from the purchaser and that in the circumstances it was too late to reverse the position. When the matter came before the learned judge on October 2, 1979 he adjourned the matter to November 6, 1979 and *inter alia* directed the liquidator to submit a report under section 243(2) of the Act including his opinion on the proposed scheme. At the resumed hearing the learned judge dismissed the application with costs and directed the liquidator to proceed with the sale. It is against this order that the appellants have appealed to us.

We would have thought that the proper approach would have been for the substantive appeal against the winding-up order to have been expedited and heard first. We were told that the court file in the matter was missing and that the notes of evidence and judgment in respect of the substantive motion under section 181 of the Act were not in hand but we have not been informed whether that is still the position, but even so the appeal could have been disposed of on a reconstruction of the necessary papers from the documents in the possession of the solicitors on both sides. It would appear to us that the appellants' application by summons is in effect an attempt to circumvent the proper appellate process by seeking the rescission of the order for winding-up of the company made in January 1978 under section 181(2)(e) and substituting therefor orders under section 181(2)(c) and (d) of the Act. When an order for winding-up a company has been delivered out but not passed and entered the court can by consent dismiss the petition (*In re Crown Bank*[1]) but this is hardly the case here where the winding-up order was perfected about 1½ years previous to the appellants' summons.

In any event the second to sixth prayers in the appellants' summons which later were sought to be substituted by a prayer for the approval of the scheme of arrangement entered into by the agreement of September 28, 1979 between the majority and minority shareholders clearly fly in the face of the prohibition enacted in section 67 of the Act as the net effect of both the original prayers and the arrangement entered into would be the purchase by the company of the 2nd, 3rd and 4th respondents' shares. Section 67 clearly prohibits except as is otherwise expressly provided by the Act the purchase by a company of its own shares or any direct or indirect financial assistance by it for the purchase of its shares. The exceptions provided for in section 67(2) do not apply. The rule laid down by the House of Lords in *Trevor* v. *Whitworth*[2] that a company has no power to purchase its own shares remains inviolate, and very recently in *Armour Hick Northern Ltd. & Ors.* v. *Whitehouse & Ors.*[3] it was held that on the true construction of the English counterpart of section 67 of the Act the prohibition against the provision of financial assistance for the purchase of shares was not confined to assistance given to a purchaser but extended to assistance given to the vendor of the shares. There is also a prayer for an order for reduction of capital without going through the essential requirements laid down in section 64 of the Act for a special resolution and the other requisite preliminaries stipulated therein before the court can make an order confirming the reduction.

Mr. Chelliah, however, in answer to our query as to how orders could be made in the light of the provisions of sections 64 and 67 says that this can be done under the provisions of section 181(2)(c) and (d) of the Act which empower the court to provide for the purchase of its shares by the company itself and in such an event for a reduction accordingly of

the company's capital. However, orders can be made under the provisions of section 181(2) of the Act only on an application under section 181(1) as its opening words expressly enact and the present application by the appellants under consideration before us is not one under section 181(1) but under section 243 of the Act for a stay of the winding-up order. The substantive motion in these proceedings was made under section 181(1) and as we have said an order that the company be wound-up was made under section 181(2)(e) at the behest of the 2nd, 3rd and 4th respondents. Not only therefore is the court precluded from making the orders asked for in the appellants' summons under section 181(2) but the High Court was also being used as a vehicle for an indirect and devious mode of appeal against the winding-up order made under section 181(2)(e) on the motion taken out under section 181(1) of the Act. The provisions of sections 64 and 67 of the Act would accordingly apply and preclude the orders sought. This point alone would suffice to dispose of the appellants' summons and justify the order of the learned judge but we go on to consider the objections advanced by the liquidator and the interests of all parties including the purchaser.

The learned judge primarily dismissed the appellants' summons as having been made rather late in the day. We find more than ample justification for this conclusion. The application for a stay was made some 1½ years after the company was ordered to be wound-up and after previous applications for a stay both to the High Court and this court were dismissed. In the previous applications for a stay very strong objection was lodged by the minority shareholders as evidenced by the affidavit of the 2nd respondent affirmed on November 20, 1978. Megarry J., (now Vice-Chancellor) in dealing with an application for a stay of winding-up proceedings under the English equivalent to section 243 of the Act in *In re Calgary and Edmonton Land Co. Ltd. (In Liquidation)*[4] observed (at pages 358-359) that the applicant for a stay must make out a case that carries conviction and that it may be that where the liquidation has been proceeding for only a short while the court ought to be more ready to grant a stay than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith of it.

The sale of the estate by the liquidator under the agreement of July 28, 1979 was virtually completed by the payment of the balance purchase price on September 20, 1979 and possession of the estate was given to the purchaser on September 22, 1979. The purchaser's solicitors wrote to the liquidator's solicitors on October 15, 1979 complaining of the delay in execution of the relevant transfers and intimating that the purchaser had been financed by the Chartered Bank which had lodged a lien-holder's caveat against the land and that the purchaser would hold the liquidator responsible for all loss and damage incurred as a result. There is little doubt that if the liquidator had at that stage resiled from the sale litigation would have ensued. The appellants however seek to rely on clause 9.3 of the agreement of July 28, 1979 between the liquidator and the purchaser for rescission of the agreement without liability in the event of the sale being stopped by an application to or by an order of court. The fact that there is an escape clause for the liquidator does not *ex necessitate* mean that the court should as a matter of course stay the winding-up as it has to take into account not only the interests of the shareholders of the company but also of the company itself and of the purchaser which had fulfilled all its obligations under the agreement and obtained finance for the purchase from the Chartered Bank on the security of the property in question. We do not think that any court in the proper exercise of its discretion would have ordered a stay at the stage the sale of the estate had reached in the circumstances of this case and resiling from the sale in those circumstances would certainly be anything but in good faith with no consideration whatsoever for the interests of the purchaser but only those of the majority shareholders and the minority shareholders who had since been appeased by a substantial acceptable offer for the purchase of their shares which again to quote counsel appearing for them 'went to (their) satisfaction'.

Any stay of the liquidation on the appellants' summons in these circumstances would certainly have offended against the very principles of commercial morality which Mr. Chelliah seeks to rely on in arguing the case for the appellants. We have therefore no doubt whatsoever that the learned judge exercised his discretion under section 243 of the Act correctly in refusing the application for a stay and the other orders sought. We would add that in the light of the intimation to us by Mr. Royan that six of the titles have already been registered in the name of the purchaser and the seventh presented for registration, clause 9.3 of the agreement of July 28, 1979 can hardly have any avail and is merely of academic interest in the circumstances.

In the premises on the conclusion of submissions before us we dismissed this appeal with costs to be borne by the appellants and directed the deposit lodged in court by way of security to be paid out to the liquidator to account of his taxed costs.

Appeal dismissed.

Solicitors: *Chin, Sethu & Co.; Shook Lin & Bok; Skrine & Co.*